No. 15138

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ARTHUR THOMAS LELLES,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG, *Judge*

APPELLEE'S BRIEF

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APPELLEE'S BRIEF

I

STATEMENT OF JURISDICTION

The Indictment in this case alleged that the defendants caused the interstate shipments of adulterated food at Seattle, Washington, within the jurisdiction of the District Court. (R. 3-5).

Pursuant to 21 U.S.C. 331(a), 21 U.S.C. 333(a),

and 18 U.S.C. 3231, the District Court had jurisdiction to try this case.

Under 28 U.S.C. 1291, this Court has authority to review the judgment of the District Court.

II

STATEMENT OF FACTS

On September 28, 1955, a two-count Indictment was filed in this case. (R. 3-6). The Indictment named Cultured Mushroom Industries, Inc., and Arthur Thomas Lelles as defendants in both counts, and charged them with violating the Federal Food, Drug, and Cosmetic Act by causing adulterated food to be introduced into interstate commerce. More specifically, the Indictment charged that the food involved consisted in part of a filthy substance by reason of the presence therein of insect larvae and insect fragments.

The defendant Cultured Mushroom Industries, Inc., is a corporation organized in 1940 under the laws of the State of Washington. (Plaintiff's Ex. 10; see also R. 57). It does business at 2954 Admiral Way, Seattle, Washington. (R. 48). It is controlled and managed by defendant Arthur Thomas Lelles who is its president. (R. 48, 57; Plaintiff's Ex. 10).

Mr. Lelles also controls, manages, and is the president of the Washington Mushroom Industries,

Inc., a Washington corporation formed in 1949. (Plaintiff's Ex. 11 and 9; R. 48, 57). This firm does business at the same address as the Cultured Mushroom Industries, Inc. (R. 47-48, 57).

Mr. Lelles controls 98 out of 100 shares of stock in both corporations; only 2 qualifying shares in each firm are held by other persons. (R. 48, 61).

It was certified by the Secretary of State of the State of Washington that both corporations were in good standing with all fees paid to June 30, 1956. (Plaintiff's Ex. 10 and 11).

On February 7 and 8, 1955, Food and Drug Inspector Baukin inspected the plant of Cultured Mushroom Industries, Inc., at 2954 Admiral Way, Seattle, and had a series of conversations with defendant Lelles concerning the product Cultured Mushroom Salt. (R. 39). At first, Mr. Lelles denied that he had shipped Cultured Mushroom Salt in interstate commerce. (R. 41). A few minutes later, Inspector Baukin again inquired of Mr. Lelles about shipments of Cultured Mushroom Salt. (R. 41). This time, Mr. Lelles turned to a lady employee and said, "Give him those two shipments." (R. 41). That employee then informed Inspector Baukin that 2 dozen shaker cans were sent to Mr. Charles Imhoff, Leon, Iowa, on January 22, 1955, and that 6 dozen shaker cans were sent to Mr.

Ted Fitzl, Eau Claire, Wisconsin, on January 24, 1955. (R. 43).

On February 18, 1955, Food and Drug Inspector Southworth called on said Mr. Imhoff at his home in Leon, Iowa. (R. 30). In the early or middle part of February, 1955, Mr. Imhoff had received from Washington Mushroom Industries, Inc., Seattle, Washington, 2 cartons each containing 12 shaker cans of Cultured Mushroom Salt. (R. 32). Except for removing the outer wrapper to see if what he had ordered was all there, Mr. Imhoff had not disturbed the cartons or opened any of the shaker cans. (R. 33).

Inspector Southworth purchased 12 of these shaker cans from Mr. Imhoff, taking 6 cans from each carton and placing the 12 cans in one of the cartons. (R. 30). With the shaker cans were a number of leaflets, some secured to the cans by means of rubber bands, and some loose. (R. 31).

Inspector Southworth identified all of the shaker cans and leaflets, as well as the display carton with the Sample No. 10-067 M, the date 2/18/55, and his initials, H. R. S. (R. 31). He did not in any way disturb the contents of the individual shakers. (R. 31). He placed the entire sample — display carton, shaker cans, and leaflets — in a fiber carton, sealed the fiber carton with an official Food and Drug seal identified

as "10-067 M, February 18, 1955, Harold R. Southworth", and mailed it to the Seattle District of the Food and Drug Administration. (R. 31).

Food and Drug Chemist William W. Wallace, of the Seattle District office, received this sample with the seals intact. (R. 20-21). In analyzing the sample for filth, he used up the contents of 4 cans. (R. 21-22, 27). He also set aside 4 cans for Mr. Lelles if Mr. Lelles wanted them for his own analysis.[1] (R. 27-28, 87). The remaining 4 cans of this sample were introduced in evidence. (Plaintiff's Ex. 1A, 1B, 1C, 1D). Also in evidence is the display carton which Inspector Southworth obtained from Mr. Imhoff. (Plaintiff's Ex. 1).

On March 28, 1955, Food and Drug Inspector Vinz called on the aforesaid Mr. Ted Fitzl at his residence in Eau Claire, Wisconsin. (R. 34). Toward the end of January, 1955, Mr. Fitzl had received from Washington Mushroom Industries, Inc., Seattle, Washington, 6 display cartons each containing 12 cans of Cultured Mushroom Salt. (R. 37).

Inspector Vinz obtained 12 of these cans from Mr. Fitzl, taking 4 cans out of each of 3 display cartons,

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[1] Under 21 U.S.C. 372(b), the defendants had a right to be provided with a part of the official samples, upon request. *Triangle Candy Co., et al* v. *United States*, 144 F. 2d 195, 198-199 (C.A. 9, 1944).

(R. 34). Mr. Fitzl had never touched any of these cans. (R. 38). Inspector Vinz also obtained a display carton from Mr. Fitzl. (R. 34). A leaflet was attached to each can by a rubber band. (R. 34).

Inspector Vinz wrapped and sealed the items comprising this sample, identifying the sample by the date 3/28/55, the sample number 10-565 M, and his signature, George L. Vinz. (R. 36). He never disturbed the contents of the shakers. (R. 36). The next day he mailed the sample to the Seattle District of the Food and Drug Administration. (R. 36).

Food and Drug Chemist Wallace, of the Seattle District office, received this sample with the seals intact. (R. 23). In analyzing the sample for filth, he used up the contents of 3 cans. (R. 23, 27-28). He also set aside 3 cans for Mr. Lelles.[2] (R. 28). The remaining 6 cans of this sample were introduced in evidence. (Plaintiff's Ex. 3A, 3B, 3C, 3D, 3E, 3F). Also in evidence is the display carton which Inspector Vinz obtained from Mr. Fitzl. (Plaintiff's Ex. 3).

Mr. Wallace has been employed as a chemist with the Food and Drug Administration for over 16 years. (R. 19). His specialty has been the analysis of foods for filth. (R. 19). Essentially, his examination con-

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[2] See footnote 1.

sists of two procedures: (1) the separation of the filth from the food and (2) the identification of the filth particles. (R. 20). The methods which he used have been known and used for many years. (R. 21, 25).

With respect to Sample No. 10-067 M, the basis for Count I of the Indictment, he examined 4 cans and testified that his findings were as follows (R. 20, 22):

Can No. 1— 28 whole larva or equivalent larva and large beetle fragments 1 - 2 millimeters across
140 microscopic fragments 1/10 to 1 millimeter across

Can No. 2— 15 whole larva or equivalent
6 large larva or beetle fragments
120 smaller fragments

Can No. 3— 24 whole larva or equivalent
3 larger larva fragments
98 smaller fragments

Can No. 4— 12 whole larva or equivalent
4 large fragments of larva or beetle
93 smaller fragments

With respect to Sample No. 10-565 M, the basis for Count II, he examined 3 cans and testified that his findings were as follows (R. 23-24):

Can No. 1— 50 whole larva or equivalent
4 large insect fragments about 1 millimeter
210 microscopic fragments of larva or beetle
2 5-millimeter rat or mouse hairs

Can No. 2— 42 whole larva or equivalent
6 large fragments of larva or beetle
232 smaller fragments

Can No. 3— 46 whole larva or equivalent
306 smaller fragments of larva or beetle

Mr. Wallace made photographs of some of the insect fragments which he observed under the microscope. In the photographs, the particles are magnified 71 times. (R. 25). Plaintiff's Exhibit 5 is a photograph which relates to some of his findings on Sample No. 10-067 M. (R. 24). Plaintiff's Exhibit 6 is a photograph which relates to some of his findings on Sample No. 10-565 M. (R. 25). Insects in food are classified as filth. (R. 26).

The defense in this case was based entirely upon Mr. Lelles' assertion that the Cultured Mushroom Salt involved in Counts I and II was manufactured in 1941 (R. 58) and found free from filth by the Food and Drug Administration in 1950. (R. 58-59, 27, Defendants' Ex. A-1).

The rebuttal evidence established that the following differences existed between the mushroom salt which had been examined by the Food and Drug Administration in 1950 and the samples examined in the present case:

1950 Samples	*Present Samples*
(1) No appreciable filth (R. 79)	(1) Substantial filth (R. 22-24)
(2) Appreciable amount of *corn* starch (R. 79-81)	(2) A few grains of starch—not enough to permit identification as corn starch. (R. 82-83, 86)
(3) Net weight per can —.90 oz. (Defendants' Ex. A-1)	(3) Net weight per can —from 1.63 oz. to 1.83 oz. (R. 21, 23)
(4) Headspace per can— 2¾ in. to 3 5/16 in. (R. 79-80)	(4) Headspace per can— 1⅜ in. to 1⅝ in. (R. 85)

Food and Drug Inspectors Baukin and Lipera testified that during a factory inspection of February 7 and 8, 1955, Mr. Lelles stated he had made between four and five hundred pounds of mushroom salt in the "last few months". (R. 73, 75). Mr. Lelles also told them that the composition of the mushroom salt he was then manufacturing consisted of one pound of ground, dried mushrooms and nine ounces of salt, with nothing else in it. (R. 73). In the mushroom salt which he manufactured in1941, he had added corn starch to prevent caking. (R. 62-64).

On February 28, 1956, the jury found both defendants guilty as charged in Count I and Count II of the Indictment. (R. 6).

It was then stipulated by the parties that on August 7, 1950, the defendants, Cultured Mushroom Industries, Inc., and Arthur Thomas Lelles, had been convicted on a plea of guilty of violating the Federal Food, Drug, and Cosmetic Act.[3] (R. 7).

On March 21, 1956, the District Court granted the motion of defendant Cultured Mushroom Industries, Inc., for a judgment of acquittal and denied the motion of defendant Lelles for a new trial. (R. 9-10).

On March 21, 1956, the District Court entered a judgment finding the defendant Lelles to be guilty as charged, convicting him, and sentencing him to 18 months imprisonment on Count I and to 18 months imprisonment on Count II, the execution of sentence on Count II to be concurrent with the execution of sentence on Count I. The Court also imposed a fine of $1,000 on each count. (R. 11).

On March 21, 1956, defendant Lelles filed a Notice of Appeal. (R. 12-13). On the same day, the District Court approved a $5,000 cash bond permitting the defendant Lelles to be at liberty during the pendency of the appeal. (R. 13-15).

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[3] Under 21 U.S.C. 333(a), such a prior conviction subjected the defendants to the imposition of a heavier penalty.

III

STATUTORY PROVISIONS INVOLVED

Federal Food, Drug, and Cosmetic Act:

"*21 U.S.C. 342. Adulterated Food.*

"A food shall be deemed to be adulterated—

"(a) (3) if it consists in whole or in part of any filthy, putrid, or decomposed substance, or if it is otherwise unfit for food; . . ."

"*21 U.S.C. 331. Prohibited Acts.*

"The following acts and the causing thereof are hereby prohibited:

"(a) The introduction or delivery for introduction into interstate commerce of any food, drug, device, or cosmetic that is adulterated or misbranded."

"*21 U.S.C. 333. Penalties—Violation of Section 331.*

"(a) Any person who violates any of the provisions of section 331 shall be guilty of a misdemeanor and shall on conviction thereof be subject to imprisonment for not more than one year, or a fine of not more than $1,000, or both such imprisonment and fine; but if the violation is committed after a conviction of such person under this section has become final such person shall be subject to imprisonment for not more than three years, or a fine of not more than $10,000, or both such imprisonment and fine."

IV

QUESTIONS PRESENTED

(1) Is there substantial evidence in the record to support the judgment of the District Court convicting defendant Lelles?

(2) Was there prejudicial error in admitting the rebuttal testimony of Elliott and Wallace?

(3) Was there a fatal variance between the Indictment and the proof?

(4) Was there prejudicial error in submitting the entire case to the jury?

V

SUMMARY OF ARGUMENT

A. *The Judgment of the District Court Must Be Sustained If There Is Substantial Evidence to Support It.*

Appellant challenges the sufficiency of the evidence upon which he was convicted. This Court will not reweigh the evidence, and the judgment of the District Court must be sustained if there is substantial evidence to support it, taking the view most favorable to the Government.

B. *The Evidence Which Supports the Judgment of the District Court Is Not Only Substantial But Overwhelming.*

Appellant Lelles manufactures and distributes Cultured Mushroom Salt. His business activities are conducted through two corporations — Washington Mushroom Industries, Inc., and Cultured Mushroom Industries, Inc., — which he controls and manages. He is president of both firms.

Early in 1955, he caused the two interstate shipments of Mushroom Salt involved in this case to be made in the name of Washington Mushroom Industries, Inc.

The Food and Drug Administration obtained and examined samples of these shipments. Such analyses by an experienced chemist revealed extensive insect infestation in the products.

Defendants offered no analytical evidence. Their defense was that the 1955 shipments came from old stocks of Mushroom Salt which the Food and Drug Administration had examined in 1950 and found free from filth.

In rebuttal, the Government produced scientific data which established that the 1955 shipments could not have come from the stocks it had examined in 1950. The Government also showed that Lelles had produced

between 400 and 500 pounds of Mushroom Salt shortly before the 1955 shipments were made, and that his 1950 stocks had been depleted by November of 1954.

Lelles had been convicted of a felony. The jury could disregard his testimony as self-serving and untrue, and place credence in the impressive testimony produced by the Government.

The conviction of Lelles is supported by substantial evidence of the most compelling character.

C. *Defendant's Motion at Close of Government's Evidence Was Waived.*

At the close of the Government's case in chief, both defendants moved the District Court to dismiss the Indictment and direct a verdict of not guilty. The District Court denied this motion. Defendants then introduced evidence. At the close of all the evidence, defendants renewed this motion. Again it was denied.

By introducing evidence, defendants waived their first motion. Only the second motion may be considered on appeal so that the sufficiency of the evidence is measured by all of the evidence and is not limited to the evidence in the Government's case in chief.

D. *The Government's Rebuttal Evidence Was Properly Admitted.*

The Government's rebuttal testimony disproved the defense and was therefore properly rebuttal rather than part of the Government's case in chief. It brought out the distinguishing scientific characteristics of the 1950 and the 1955 samples, and demonstrated that the two sets of samples could not have come from the same stock. The rebuttal testimony also disproved Lelles' assertion that he had not manufactured substantial amounts of Mushroom Salt just before the 1955 shipment.

The admission of rebuttal testimony is within the sound discretion of the District Court. In the absence of abuse of discretion, the Court may even allow evidence in rebuttal which could or should have been offered in chief. There was no abuse of discretion, the Court even allowing defendants to introduce their own rebuttal testimony at the close of the Government's rebuttal.

Opinion evidence of an expert chemist that the two sets of samples could not have come from the same stock was properly admitted. This opinion did not deal with an ultimate issue in the case. Furthermore, opinion evidence is not inadmissible merely because it is offered on an ultimate issue.

There was no prejudicial error in any of the Government's rebuttal testimony.

E. *There Is No Fatal Variance In This Case.*

Count I alleged that an interstate shipment of Mushroom Salt was made "on or about February 10, 1955." The evidence showed that the shipment was made prior to that date, perhaps as much as 19 days earlier.

This is not a fatal variance. The charge of a date in this Indictment is not a material allegation which must be proved as laid.

F. *There Was No Misjoinder of Parties Defendant Nor Error in Submission of Entire Case to Jury.*

The two defendants were properly joined in this Indictment. Lelles did not object to this joinder at any stage in the District Court. He has therefore waived his right to make such an objection.

The conviction of Lelles is not inconsistent with the acquittal of the corporate defendant. Nor was Lelles prejudiced by the submission of the entire case to the jury.

The acquittal of the corporate defendant is a "false quantity" in the consideration of the sufficiency of the evidence to support the guilty verdict as to

Lelles. A verdict of guilty as to one defendant is not invalidated by acquittal of a co-defendant even if there is some inconsistency.

The evidence in support of the conviction of Lelles is substantial.

VI

ARGUMENT

A. *The Judgment of the District Court Must Be Sustained If There Is Substantial Evidence to Support It.*

Lelles was found guilty on both Counts by the jury and was convicted on both Counts by the Judgment of the District Court. He now challenges the sufficiency of the evidence upon which he was convicted. Under such circumstances, the function of this Court is clear.

In *Woodard Laboratories, Inc.* v. *United States,* 198 F. 2d 995 (C.A. 9, 1952) this Court said at page 998:

> "The usual rule to be followed in determining the sufficiency of evidence to sustain a judgment is well settled. 'It is not for us to weigh the evidence or to determine the credibility of witnesses. The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it.' Glasser v. United States, 1942, 315 U.S. 60, 80 . . ."

See also *Adelman* v. *United States*, 216 F. 2d 541, 543 (C.A. 9, 1954).

And in *Henderson* v. *United States*, 143 F. 2d 681 (C.A. 9, 1944), this Court observed at page 682:

> "It is a familiar principle, which it is our duty to apply, that an appellate court will indulge all reasonable presumptions in support of the rulings of a trial court and therefore that it will draw all inferences permissible from the record, and in determining whether evidence is sufficient to sustain a conviction, will consider the evidence most favorably to the prosecution . . ."

See also *Pasadena Research Laboratories, Inc.* v. *United States*, 169 F. 2d 375, 380 (C.A. 9, 1948), cert. den. 335 U.S. 853.

The entire tenor of appellant's brief, insofar as it deals with the sufficiency of the evidence, is to the effect that this Court should reweigh the evidence "in the most favorable light as far as the defendant is concerned" (Appellant's Brief 12), and emerge with conclusions different from those of the jury and the District Court. Manifestly, appellant misconceives the function of this Court.

B. *The Evidence Which Supports the Judgment of the District Court Is Not Only Substantial But Overwhelming.*

In our Statement of Facts, we have shown that defendant Lelles controlled and managed two corpora-

tions, Cultured Mushroom Industries, Inc., and Washington Mushroom Industries, Inc. (R. 57). Under the name of Washington Mushroom Industries, Inc., he caused the interstate shipments of the Cultured Mushroom Salt involved in this case. (R. 41-43, 57, 61, 32, 37).

That the samples in evidence (Plaintiff's Exhibits 1, 1A-1E, 3, and 3A-3F) were obtained from the purchasers who had received them in interstate commerce is not disputed by the appellant. (Appellant's Brief 8-9).

To support the charge that this Mushroom Salt was adulterated by reason of the presence of insect larvae and insect fragments, the Government presented the testimony of William W. Wallace, an experienced chemist who had analyzed a portion of the samples of the Mushroom Salt in question. The details of his analytical data are set forth above in our Statement of Facts. Mr. Wallace's testimony clearly established extensive insect infestation in the products. (R. 22-25).

Noteworthy is the failure of the defendants to introduce any analytical evidence to refute the Government's evidence that these samples were adulterated. As required by statute and regulations,[4] a por-

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[4] See footnote 1.

tion of the official samples had been set aside for the defendants.

Appellant's argument that the Government "did not introduce any of the matter examined into evidence" (Appellant's Brief 12) is a specious one. Chemist Wallace selected representative cans for analysis and the analytical procedure consumed the contents of the cans he examined. (R. 27-28, 21-22). He preserved the filth portion of those contents (R. 28) and was able to testify as to his findings.

The only defense urged against the adulteration charges was that in 1950, nearly five years before the acts complained of in the Indictment, the Food and Drug Administration had examined certain codes of defendant's Mushroom Salt and had found some of those codes to be free from filth. Defendant Lelles asserted that the Mushroom Salt involved in the present case had been taken from the codes found to be free from filth in 1950. (R. 58-60), Defendants' Ex. A-1).

Even if what Mr. Lelles stated were true, it would not be a defense to the positive findings of substantial quantities of filth in the 1955 shipments. Nevertheless, if it were true that in making these shipments he was relying in good faith upon the Government's analytical data of 1950, there would be considerable mitigation

which might be considered in imposing sentence. As a practical matter, if there were any sound basis for the defense argument, the Government would have moved to dismiss the Indictment.

However, as shown in our Statement of Facts, the Government produced rebuttal testimony which conclusively established that the samples in the present case were not from the lots which had been found free from adulteration in 1950. Scientific data revealed such distinguishing characteristics as cornstarch content, headspace, net weight, and the presence or absence of filth. (R. 79-87, 21-23, Defendants' Ex. A-1). In addition, the credible evidence showed that defendant Lelles had manufactured between 400 and 500 pounds of Mushroom Salt during the period of a few months preceding the shipments in question. (R. 73-75). It was also shown that on March 4, 1953, Lelles had approximately 50 cases (72 shakers in each case) of Mushroom Salt on hand (R. 68); that on November 3, 1954, there appeared to be less than 1 dozen shakers of the Mushroom Salt on his premises (R. 69-70); but that on January 1, 1955, there were approximately 100 cases on his premises (R. 53, 55).

When it is also recalled that the destruction of adulterated Mushroom Salt in 1950 left Mr. Lelles with a large number of empty shaker cans (R. 51);

that the shakers themselves were not coded (R. 64); that Mr. Lelles had been sending out one-shaker samples from the lots found free from filth in 1950 (R. 68-69) and that this practice left him with empty display cartons bearing the code numbers of those lots —the jury could properly have inferred that Mr. Lelles had manufactured the Mushroom Salt in question late in 1954 or early in 1955; that he had filled the old empty shaker cans with this product; that those cans still retained a few grains of the cornstarch which was an ingredient of the Mushroom Salt that had been destroyed in 1950; and that he had placed those cans in the empty display cartons bearing the code numbers of the lots found free from filth in 1950.

Mr. Lelles admitted that he had been convicted of a felony[5] in 1939 (R. 67) and the jury could properly have discounted his testimony regarding the identity of the Mushroom Salt in this case as self-serving and untrue, especially in the light of the impressive rebuttal testimony produced by the Government.

The judgment of the District Court convicting the defendant, we submit, is supported by substantial evidence of the most compelling character.

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[5] His conviction of using the mails to defraud was affirmed by this Court. *Lelles* v. *United States*, 120 F. 2d 447 (C.A. 9, 1941).

C. *Defendant's Motion At Close of Government's Evidence Was Waived.*

At the close of the Government's evidence in chief, defendants moved the District Court to dismiss the Indictment and direct a verdict of not guilty. (R. 49). Under Rule 29(a) of the Federal Rules of Criminal Procedure, such motions during trial have been abolished and motions for judgment of acquittal have been substituted therefor. See *Lii* v. *United States*, 198 F. 2d 109, 112 (C.A. 9, 1952).

The District Court denied this motion. (R. 50). Thereafter, the defendants offered evidence which the court received. (R. 50-67, 88-91). By so doing, defendants waived that motion, assuming that the motion may be considered a motion for a judgment of acquittal.

In *United States* v. *Calderon*, 348 U. S. 160 (1954), the Supreme Court stated at page 164, footnote 1:

> "By introducing evidence, the defendant waives his objections to the denial of his motion to acquit . . . His proof may lay the foundation for otherwise inadmissible evidence in the Government's initial presentation . . . or provide corroboration for essential elements of the Government's case . . ."

Much of appellant's brief is devoted to the assertion that the District Court should have dismissed

the Indictment at the conclusion of the Government's case. (Appellant's Brief 7-13). But defendant's motion at that stage in the trial is not subject to review on appeal since defendant waived it by offering evidence after its denial. *Rowland* v. *United States*, 207 F. 2d 621, 622 (C.A. 9, 1953).

While defendant renewed his motion at the close of all the evidence, he is asking this Court to review and weigh the evidence piecemeal — as of the close of the Government's case in chief and as of the close of all the evidence. A comparable situation arose in *Gaunt* v. *United States*, 184 F. 2d 284 (C.A. 1, 1950), cert. den. 340 U. S. 917, where the Court said at page 290:

> "At the outset, it must be pointed out that the defendant by offering evidence on his own behalf elected to abandon his motion for acquittal made at the close of the Government's case and to rely upon a subsequent motion to the same effect made at the close of all the evidence . . . which he made, so that this later motion is the only one for consideration on this appeal. *Hence the sufficiency of the evidence as a whole to establish the defendant's wilfulness must be considered, not merely the sufficiency of the evidence offered by the Government alone on that issue.*"
> (Emphasis added).

Consequently, we submit that this Court should disregard all of appellant's arguments with respect to the denial of the motion he made at the close of the Government's case in chief, though a study of the evi-

dence at that stage discloses an overwhelming sufficiency in support of the trial court's ruling.

D. *The Government's Rebuttal Evidence Was Properly Admitted.*

Even before this case went to trial, the Government knew what the defense would be since Mr. Lelles had volunteered the same defense in May of 1955 in an administrative hearing under 21 U.S.C. 335 where he was accorded an opportunity to show cause why he should not be prosecuted. (R. 90-91).

Intimation that this defense would actually be offered at the trial came during the cross-examination of the Government's first witness, Mr. Wallace. At that point, defense counsel asked Mr. Wallace to identify a report which is part of Defendants' Exhibit A-1. (R. 26-27). Mr. Wallace readily identified this report as one he made on April 20, 1950, showing the results of analyses made by him at that time. (R. 26-27). To save time, Government counsel stipulated that Mr. Wallace had analyzed samples of Mr. Lelles' Cultured Mushroom Salt in 1950 and that Mr. Wallace had found Lots 102 and 103 to be free from filth at that time. (R. 27). It was expressly stated, however, that "*This stipulation relates only to the lots which were identified in 1950 as Lots 102 and 103.*" (R. 27).

In the direct examination of Inspector Baukin as part of the Government's case in chief, Government counsel inquired into conversations which Baukin had with Mr. Lelles on February 7 and 8, 1955, concerning Lelles' preparation of Mushroom Salt "at that time". (R. 42-45). After a series of questions on this point which were not answered because defense counsel objected and the Court sustained the objections, the following colloquy took place between the Court and Government counsel (R. 44-45):

> "The Court: Are you seeking, or anticipating the Defendant's defense here?
>
> "Mr. Roberts: Certainly, your Honor.
>
> "The Court: It seems to me that that is rebuttal.
>
> "Mr. Roberts: I am only taking the Court's time at this point, your Honor, because I feel that the defense was allowed to bring in what I felt was their case in chief.
>
> "The Court: What they brought out could have been impeachment testimony of your witness.
>
> "Mr. Roberts: That is correct.
>
> "The Court: Impeachment is not a defense necessarily. I mean, it is a defense, of course, in that it breaks down the Government's case; but it is permissible to break down the Government's witness.
>
> "Mr. Roberts: That is, of course, true your Honor."

Counsel then refrained from further effort to intro-

duce rebuttal testimony during the Government's case in chief.

When the defense presented their case in chief, they offered testimony through defendant Lelles and several of his employees that the Mushroom Salt involved in this case was manufactured in 1941 (R. 58); that it was a part of three lots—Lots 101, 102, and 103 (R. 58-59); that examination by the Food and Drug Administration and the City Sanitation Department in 1950 revealed that Lot 101 was spoiled (R. 58); that a City Inspector then segregated the lots and destroyed Lot 101 but left Lots 102 and 103 (R. 59); that there was no other Mushroom Salt on the premises when the shipments in this case were made (R. 60); that these shipments were taken from either Lot 102 or Lot 103 (R. 60); that Mr. Lelles did not tell Inspector Baukin that he had produced between 400 and 500 pounds of salt within a month prior to their conversations on February 7 and 8, 1955 (R. 66-67); and that there was no one with Mr. Baukin when they had that conversation (R. 67).

To rebut this defense, the Government then offered the testimony of five inspectors and two chemists. (R. 67-87). We have already described the substance of their testimony and the inferences which the

jury could properly draw. (Statement of Facts and Part B of Argument).

Appellant now challenges the admissibility of some of this rebuttal testimony, but his arguments are without substance.

With respect to the rebuttal testimony of Mr. Elliott and Mr. Wallace, appellant argues that their testimony established "what should have been established as the Government's case in chief." (Appellant's Brief 15). It is difficult to believe that this argument is offered seriously. Their testimony on rebuttal was offered for the sole purpose of contradicting the defense contention that the Mushroom Salt shipments in this case came from the Lots 102 and 103 which they had examined in 1950 and found free from filth. (R. 81-82). Mr. Elliott had examined samples of those lots in July of 1950. (R. 79). Mr. Wallace had examined samples of those lots in April of 1950. (R. 27; Defendants' Ex. A-1). As we have already shown, the rebuttal testimony of these chemists brought out the analytical data which clearly distinguished the 1950 samples from the 1955 samples.

The rebuttal testimony of Inspector Baukin, to which appellant also objects (Appellant's Brief 20), was intended to show admissions by defendant Lelles that he had manufactured Mushroom Salt shortly be-

fore the shipments in question. (R. 70-74). When Baukin testified in the Government's case in chief, he stated that during the inspection at the Lelles plant on February 7 and 8, 1955, he had a "series of conversations with Mr. Lelles." (R. 39). *He was then asked to describe any conversation he had with Mr. Lelles about current interstate shipments of Mushroom Salt.* (R. 40). His answer to that question was interrupted by several objections, arguments, and rulings. (R. 40-42). Mr. Baukin was then asked whether Lelles had told him how he was preparing Mushroom Salt at that time. (R. 42). Objection to that question was argued and sustained. (R. 42-43). At that point, the Court interrogated Baukin (R. 43):

> "The Court: Have you given us the full conversation that was requested? Have you given the full conversation that was requested, as best you can recall it?
>
> "The Witness: Yes."

When Baukin was recalled on rebuttal and asked to testify to conversations he had had with Lelles on February 7 and 8, 1955, regarding current production of Mushroom Salt, defense counsel objected on the ground that in his testimony in chief, Baukin stated he had given "the complete text of the conversation." (R. 71). After some argument, this objection was overruled. (R. 71-72). Mr. Baukin then explained

what conversation he had in mind when he answered the Court's question (R. 72):

> "The discussion that I referred to as having been completed was relative to one particular point yesterday relating to interstate shipments."

Appellant now argues that "Obviously a reading of the transcript (Tr. 43) shows that it was not a conversation with regard to shipments but was one with regard to the manufacture of mushroom salt." (Appellant's Brief 15). Appellant presents a distorted version of what transpired. A reading of the Record from the bottom of page 39 through the middle of page 43, unequivocally shows that Baukin, just before answering the Court's question, had testified at some length concerning conversations with regard to *shipments of Mushroom Salt* but had heard the Court repeatedly sustain objections to questions about the *preparation of Mushroom Salt.* It was reasonable for Baukin to assume that the Court was referring to the conversation about which he *had* been permitted to testify, rather than to the conversation about which he *had not* been permitted to testify.

It will be recalled that when Government counsel several times attempted, during the Government's case in chief, to elicit testimony which would show that Mr. Lelles was manufacturing Mushroom Salt late in 1954 and early in 1955, defense counsel objected on the

ground that such testimony was "outside the issues of this case." (R. 42-44). The District Court sustained these objections and suggested that the Government not anticipate the defense. (R. 44-45).

Defendant, having clearly injected the "identity" issue into the case by his own testimony and having denied manufacturing Mushroom Salt within a few months of the 1955 shipments, could not properly object to the Government's rebuttal testimony which was offered to show (1) that the 1955 samples could not have come from the lots found free from filth in 1950, and (2) that the defendant in fact manufactured Mushroom Salt shortly before the shipments complained of in the Indictment.

In an analogous situation, *United States* v. *Chiarella*, 184 F. 2d 903 (C.A. 2, 1950), remanded to District Court for resentencing, 341 U.S. 946 (1951), the Court of Appeals said on page 907:

> "On what theory an accused may complain that details of an occurrence were developed on redirect which he brought into the case on cross, we are not advised."

In *United States* v. *Crowe*, 188 F. 2d 209 (C.A. 7, 1951), the Court said at page 213:

> "The function of rebuttal is to explain, repel, counteract or disprove adversary's evidence."

The admission of rebuttal testimony is within the sound discretion of the District Court, and in the absence of an abuse of discretion, the Court may even allow evidence in rebuttal which could or should have been offered in chief. In *Cornes* v. *United States*, 119 F. 2d 127 (C.A. 9, 1941), this Court said at page 130:

> "Appellant contends that certain evidence which was offered in rebuttal, and was admitted, should have been excluded as not being proper rebuttal. Assuming, without deciding, that it was not proper rebuttal, it was nevertheless within the discretion of the Court to admit the evidence; and that discretion, in the absence of abuse, is not reviewable. *Goldsby* v. *United States*, 160 U.S. 70, 74 . . ."

See also *Marron* v. *United States*, 8 F. 2d 251, 257 (C.A. 9, 1925); *Samish* v. *United States*, 223 F. 2d 358, 365 (C.A. 9, 1955), cert. den. 350 U. S. 848.

Clearly, the testimony which the Government offered on rebuttal was proper rebuttal testimony. The District Court, which was eminently fair in the conduct of the trial, even permitted the defendants to introduce testimony in an attempt to rebut the Government's rebuttal testimony. (R. 88-91).

In Mr. Wallace's rebuttal testimony, he testified that in his professional opinion the 1950 samples of Mushroom Salt, identified as Lots 102 and 103, which he had analyzed could not possibly be the same Mush-

room Salt as the 1955 samples he analyzed. (R. 87). Appellant now argues that this was a matter for the jury to determine. (Appellant's Brief 16).

Mr. Wallace is an expert with specialized knowledge in the field of chemistry. He examined certain samples of Mushroom Salt in 1950 and other samples of Mushroom Salt in 1955. He was competent to testify that in his opinion the two sets of samples could not have come from the same stock. Such testimony did not invade the province of the jury.

In the first place, this testimony did not relate to any ultimate issue of fact. The ultimate issue was not whether the 1955 sample came from the same stock as the 1950 sample, but whether the 1955 sample was *adulterated* within the meaning of 21 U.S.C. 342(a)(3). In a similar situation under the Federal Food, Drug, and Cosmetic Act, where expert chemists testified that in their opinion the analytical data which they found in examining certain drugs reflected the condition of the drugs months prior to the time of their analysis, the admission of such testimony was sustained by this Court in *Pasadena Research Laboratories, Inc.*, v. *United States*, 169 F. 2d 375 (C.A. 9, 1948), cert. den. 335 U.S. 853, the Court observing at page 385:

> "This objection is not well grounded. A glance at the questions discloses that in none of them is there any reference to 'misbranding' or 'adulterating', which are the ultimate issues in this case . . .
>
> "All these questions dealt with *supporting* or *evidentiary* facts, and not ultimate issues."

So here there is no mention of "adulteration" in the question addressed to Mr. Wallace or in his answer.

Furthermore, it is settled that the opinion of an expert witness is not inadmissible merely because it is offered on an *ultimate* issue as long as his opinion relates to matters within his "special competence and skill and not to matters of common knowledge and observation." *Riley* v. *United States*, 225 F. 2d 558, 559 (Apps. D.C., 1955). In *Eastern Transportation Line* v. *Hope*, 95 U. S. 297 (1877), the Court said at page 298 of questions asked a tug-boat pilot:

> "The witness was an expert, and was called and testified as such. His knowledge and experience fairly entitled him to that position. It is permitted to ask questions of a witness of this class, which cannot be put to ordinary witnesses. *It is not an objection, as is assumed, that he was asked a question involving the point to be decided by the jury.* As an expert, he could properly aid the jury by such evidence, although it would not be competent to be given by an ordinary witness. It is upon subjects on which the jury are not as well able to judge for themselves as is the witness that an expert as such is expected to testify." (Emphasis added).

See also *United States* v. *Johnson*, 319 U. S. 503, 519-520 (1943); *Travelers Ins. Co.* v. *Drake*, 89 F. 2d 47, 49 (C.A. 9, 1937); *Frankfeld* v. *United States*, 198 F. 2d 679, 689 (C.A. 4, 1952), cert. den. 344 U.S. 922.

Noteworthy also because of its factual similarity to the present question is *United States* v. *Kolodny*, 149 F. 2d 210 (C.A. 2, 1945) where the defendant was prosecuted for the unlawful possession and sale of non-tax-paid liquor. On page 211, the Court said:

> "Nor do we find prejudicial error . . . in the admission of Maple's opinion testimony, based on his analysis of samples, that the spirits in the containers on the date of the arrest were not the same as had originally been placed in the containers by Commercial Solvents Corporation."

Clearly an opinion as to the identity of two sets of samples, based upon scientific analytical data, is within the special competence and skill of an expert chemist.

We submit that there was no prejudicial error in the admission of any of the rebuttal testimony of which appellant complains.

E. *There Is No Fatal Variance In This Case.*

Count I of the Indictment charges that the defendants caused a certain violative interstate shipment to be made "on or about February 10, 1955." (R. 3).

The evidence shows that this shipment was received through the mail by the consignee in Iowa "in the early or middle part of February, 1955." (R. 32). According to the records of the defendant, this shipment was made on January 22, 1955, or 19 days before the date alleged. (R. 43).

Appellant suggests that this was a significant variance and suggests that the Government somehow erred fatally in that "no motion was made at any time by Government counsel to have the indictment correspond with the proof." (Appellant's Brief 11-13). The Federal Rules of Criminal Procedure contemplate that only an Information may be amended on motion. (Rule 7(e)). An Indictment may properly be amended only by the Grand Jury. *Carney* v. *United States*, 163 F. 2d 784, 788 (C.A. 9, 1947), cert. den. 332 U.S. 824.

It has long been settled that proof that an offense was committed on a date other than alleged is not fatal to the prosecution. In *Ledbetter* v. *United States*, 170 U. S. 606 (1898), the Court said at page 612:

> "Neither is it necessary to prove that the offense was committed upon the day alleged, unless a particular day be made material by the statute creating the offense. Ordinarily, proof of any day before the finding of the indictment, and within the statute of limitations, will be sufficient."

And in *Berg* v. *United States*, 176 F. 2d 122 (C.A. 9, 1949), cert. den. 338 U.S. 876, this Court observed at page 126:

> "Even if it be true that the date alleged for the commission of a crime is not a true one or even a possible one, this does not invalidate the indictment. The charge of a date in an indictment is not a material allegation which must be proved as laid."

Thus, we submit, there is no substance to the variance issue raised by appellant.

F. *There Was No Misjoinder of Parties Defendant Nor Error In Submission of Entire Case to Jury.*

Appellant seems to be suggesting that the District Court's Judgment of Acquittal as to the defendant Cultured Mushroom Industries, Inc., after both defendants were found guilty as charged by the jury, somehow establishes that there was a prejudicial misjoinder of parties. (Appellant's Brief 7, 10, 16-20).

Rule 8(b) of the Federal Rules of Criminal Procedure declares in part:

> "Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses."

The Indictment in this case charges both defend-

ants with having participated in the same act constituting an offense in each count. Joinder of defendants was clearly authorized.

Rule 14 provides for relief from prejudicial joinder. No such relief was sought by appellant in the District Court before, during, or after the trial. Failure to object to joinder before trial constitutes a waiver. See Cyclopedia of Federal Procedure (3rd Ed.), Vol. 11, pages 440-441; *Smith* v. *United States*, 180 F. 2d 775 (Apps. D.C., 1950). Following the verdict of the jury and before the acquittal of the corporate defendant, both defendants moved for a new trial but the motion made no request for a severance of defendants. (R. 8). The "misjoinder" issue, we submit, was simply an afterthought.

Appellant complains that his conviction is inconsistent with the acquittal of the corporate defendant, and seems to suggest that he was prejudiced by the District Court's action in submitting the entire case to the jury. On page 17 of his brief, appellant says:

> "If the Court had sustained the motion as he should have done, to the corporation, and merely submitted the matter as to A. T. Lelles, then we would have another question for this Court."

Appellant apparently believes that the subsequent acquittal of the corporation made mandatory his own acquittal.

At the close of all the evidence, both defendants moved for a directed verdict and for a dismissal of the Indictment. (R. 91). The Court denied the motion as to the individual defendant and reserved ruling as to the corporate defendant. (R. 94). After both defendants were found guilty by the jury (R. 6), the Court acquitted the corporation. (R. 7). A closely parallel situation was presented in *United States* v. *Griffin*, 176 F. 2d 727, 728 (C.A. 3, 1949), cert. den. 338 U. S. 952, and the defendant who was not acquitted claimed, as appellant does here, that he was prejudiced because the other defendant had not been acquitted *before* the case went to the jury. In a well-considered opinion, the Court dismissed this argument as without merit. The Court also pointed out that in reserving a decision on the motion, the trial court had acted in exact accordance with Rule 29(b) of the Federal Rules of Criminal Procedure.

The evidence plainly established Mr. Lelles' responsibility for the offenses alleged, regardless of whether he had acted in his capacity as president of defendant Cultured Mushroom Industries, Inc., or as president of the non-defendant Washington Mushroom Industries, Inc., or both. There was no fatal inconsistency in convicting Lelles and acquitting the corporate defendant. In a leading case under the Federal Food, Drug, and Cosmetic Act, *United States* v. *Dot-*

terweich, 320 U.S. 277 (1943), the jury had convicted Dotterweich but had disagreed as to the guilt of the corporation of which he was the president. Rejecting Dotterweich's argument, similar to appellant's here, the Supreme Court said at page 279:

> "Equally baseless is the claim of Dotterweich that, having failed to find the corporation guilty, the jury could not find him guilty. Whether the jury's verdict was the result of carelessness or compromise or a belief that the responsible individual should suffer the penalty instead of merely increasing, as it were, the cost of running the business of the corporation, is immaterial. Juries may indulge in precisely such motives or vagaries."

See also *Bridgman* v. *United States*, 183 F. 2d 750 (C.A. 9, 1950) where this Court said at page 753:

> "Even if we assume that the verdicts were inconsistent, it is well settled that such inconsistence is not fatal to and does not invalidate verdicts of guilty . . .
>
> "Moreover, acquittal of appellant's co-defendants 'is a false quantity in the consideration of' the sufficiency of the evidence to support the verdicts . . ."

We submit that there is no basis for appellant's assertion of misjoinder and error in the submission of the entire case to the jury.

VII

CONCLUSION

We submit that no prejudicial error was made in the Court below and that the District Court conducted the trial with conspicuous fairness. In view of appellant's assiduous search for flaws in the Record, we believe it appropriate to close this brief by quoting from the concurring opinion in *Johnson* v. *United States*, 318 U.S. 189, 202 (1943):

> "In reviewing criminal cases, it is particularly important for appellate courts to re-live the whole trial imaginatively and not to extract from episodes in isolation abstract questions of evidence and procedure. To turn a criminal appeal into a quest for error no more promotes the ends of justice than to acquiesce in low standards of criminal prosecution."

Respectfully submitted,

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